No. 89-680

In The

Supreme Court of the United States

October Term, 1989

JAMES B. BEAM DISTILLING CO.,

Petitioner,

v.

STATE OF GEORGIA, JOE FRANK HARRIS, individually and as Governor of the State of Georgia, MARCUS E. COLLINS, individually and as Georgia State Revenue Commissioner, and CLAUDE L. VICKERS, individually and as Director of the Fiscal Division of the Department of Administrative Services,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JEFF L. MILSTEEN
Assistant Attorney General
(Counsel of Record for Respondents)

MICHAEL J. BOWERS
Attorney General

H. PERRY MICHAEL
Executive Asst. Attorney General

HARRISON KOHLER
Deputy Attorney General

DAVID A. RUNNION
Senior Asst. Attorney General

Warren R. Calvert
Assistant Attorney General

Attorneys for Respondents

Georgia Department of Law
132 State Judicial Building
Atlanta, Georgia 30334
(404) 656-3388

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTIONS PRESENTED

I. Whether this Court should grant certiorari in order to decide this case along with *McKesson Corp. v. Division of Alcoholic Beverages and Tobacco*, ___ U.S. ___, 109 S. Ct. 3238 (1989), despite the fact that this case bears no factual resemblance to *McKesson*.[1]

II. Whether this Court should grant certiorari to determine if "the denial of a refund of unconstitutionally collected taxes in and of itself amounts to an unconstitutional deprivation of property," where Petitioner failed to properly raise this argument at any point during the proceedings below.

III. Whether this Court should grant certiorari to determine if the Supreme Court of Georgia, in construing Georgia's tax statutes so as to preclude the refund of state taxes sought by Petitioner, properly applied Georgia law.

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[1] On July 3, 1989, this Court set *McKesson* for reargument and directed the parties to submit additional briefs on the following question: "When a taxpayer pays under protest a state tax found to violate clearly established law under the Commerce Clause must the State provide some form of retrospective relief, such as a tax refund or an offsetting tax on past beneficiaries of the tax preference, or may the State elect to provide only prospective relief?" In framing its Question Presented for Review, Petitioner contends that the identical issue is presented in this case. (Pet. for Writ of Certiorari, p. i.) In fact, as discussed below, Petitioner did not pay its taxes under protest; neither did Petitioner base its claim to a tax refund on federal constitutional principles, but instead relied solely on Georgia's tax refund statute.

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The Respondents in the above-styled action respectfully oppose the Petition for Writ of Certiorari to the Supreme Court of Georgia. The question presented by Petitioner for review is inapposite to the disposition of this case, and none of the considerations outlined in Supreme Court Rule 17 governing review on certiorari are met. Accordingly, Respondents request that the Petition be denied.

CITATIONS TO OPINIONS BELOW

The opinion of the Supreme Court of Georgia is officially reported at 259 Ga. 363 (1989), and is unofficially reported at 382 S.E.2d 95 (1989). In addition, the text of the opinion is included as Exhibit A in the Petitioner's Appendix to Petition for Writ of Certiorari.

STATEMENT OF JURISDICTION

Respondents concur in the Petitioner's Statement of the Grounds on Which the Jurisdiction of this Court is Invoked.

STATUTORY PROVISION AT ISSUE

The statute at issue in this case is O.C.G.A. § 3-4-60 as it existed prior to its amendment in 1985. The text of O.C.G.A. § 3-4-60 as it then existed is included as Exhibit B in the Petitioner's Appendix to Petition for Writ of Certiorari.

STATEMENT OF THE CASE

Petitioner, James B. Beam Distilling Company, brought this action challenging the constitutionality of O.C.G.A. § 3-4-60, as codified in 1982, 1983 and 1984 (hereinafter "the claim period"), and, pursuant to O.C.G.A. § 48-2-35(a), claimed a refund of $2,400,000 for taxes paid under the now repealed statute. As codified during the claim period, O.C.G.A. § 3-4-60 imposed taxes

on all alcoholic beverages manufactured in or imported into Georgia. Under the provisions of the statute, alcoholic beverages imported into the State by either in-state or out-of-state producers or manufacturers were subject to a higher tax than alcoholic beverages manufactured in Georgia. 1981 Ga. Laws 1269, § 35; O.C.G.A. § 3-4-60 (Michie 1982).

A tax structure similar to that embodied by O.C.G.A. § 3-4-60 had been in effect in Georgia since 1938. The original legislation imposing taxes on alcoholic beverages manufactured and imported into Georgia was enacted in 1938 as Section 11 of the "Revenue Tax Act to Legalize and Control Alcoholic Beverages and Liquors" (hereinafter the "1938 Act"). 1937-38 Ga. Laws (Ex. Sess.) 103.

Enacted not long after the end of Prohibition and the adoption of the Twenty-first Amendment, the 1938 Act was intended to provide for the "taxation, legalization, control, manufacture, importation, distribution, sale and storage of alcoholic beverages." 1937-38 Ga. Laws (Ex. Sess.) 103. Under Section 11 of the Act, alcoholic beverages manufactured from out-of-state products were subject to a higher tax than alcoholic beverages manufactured from Georgia-grown products.

Shortly after its enactment, Section 11 of the 1938 Act was challenged on the grounds that it violated the Commerce Clause of the Constitution of the United States. In *Scott v. State*, 187 Ga. 702, 2 S.E.2d 65 (1939), *overruled on other grounds, Blackston v. Georgia Department of Natural Resources*, 255 Ga. 15, 334 S.E.2d 679 (1985), the Georgia Supreme Court upheld the constitutionality of Section 11.

Since 1938, the tax system created by Section 11 of the 1938 Act has been amended several times to revise rates and effect other minor changes. The most recent amendment was in 1985, which amendment, in response to this Court's ruling in *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984), repealed the statute at issue in this case. The 1985 Amendment also imposed a direct tax on the importation of alcoholic beverages into Georgia. 1985 Ga. Laws 665; O.C.G.A. § 3-4-60 (Michie 1988 Supp.).

In April of 1985, the 1985 Amendment was challenged on Equal Protection and Commerce Clause grounds. The Georgia Supreme Court, as it had in *Scott*, upheld the constitutionality of the tax structure, finding that it did not violate the Commerce Clause. *Heublein, Inc. v. Georgia*, 256 Ga. 578, 351 S.E.2d 190, *appeal dismissed*, 483 U.S. 1013 (1987). This Court declined further review of the Georgia Supreme Court's decision; the post-*Bacchus* amendment is not at issue in this case.

Also in April of 1985, the Petitioner filed a claim with the Georgia Revenue Department for a refund of taxes allegedly paid pursuant to O.C.G.A. § 3-4-60, as the statute existed during 1982, 1983 and 1984, challenging the constitutionality of the statute which was by then repealed. On April 24, 1987, the Petitioner filed this tax refund action pursuant to O.C.G.A. § 48-2-35(a). In its Complaint, the Petitioner challenged O.C.G.A. § 3-4-60, as codified during the claim period, on the grounds that its tax provisions related to alcoholic beverages manufactured outside of Georgia violated the Commerce Clause and the Equal Protection Clause of the United States Constitution.

This matter came before the trial court on cross motions for summary judgment. After hearing these motions, the Superior Court of Fulton County, on May 27, 1988, entered an order holding O.C.G.A. § 3-4-60, as codified during the claim period, unconstitutional under the Commerce Clause. However, the trial court directed that its decision on the statute's constitutionality apply prospectively only, and that Petitioner therefore recover nothing on its claim for refund of the taxes paid in the past.

Petitioner appealed the trial court's "prospectivity" holding to the Supreme Court of Georgia, urging that Georgia's refund statute required a refund as a matter of state law. The Georgia Supreme Court, in a decision dated July 14, 1989, ruled that the Georgia refund statute did not mandate a refund, and that the trial court correctly interpreted Georgia law in applying its decision prospectively. The court denied Petitioner's Motion for Rehearing on July 26, 1989. Petitioner thereafter filed the instant Petition for Writ of Certiorari.

SUMMARY OF ARGUMENT

This petition arose as a result of Petitioner's claim that it was entitled to a refund, pursuant to O.C.G.A. § 48-2-35, of taxes it paid on alcoholic beverages between 1982 and 1984. Having failed to persuade the Georgia courts that Georgia's law mandates a refund of the taxes paid, Petitioner now asserts for the first time on appeal that a vague and undefined federal refund remedy must accompany any finding that a previously repealed state

tax statute was unconstitutional. In so arguing, Petitioner relies entirely on alleged similarities between this case and *McKesson*. In fact, the *McKesson* petitioners seek a refund of taxes paid, *under protest*, to the State of Florida *after* the Florida legislature amended the state's taxing statutes in response to this Court's decision in *Bacchus*. Since the Georgia Supreme Court's decision regarding the construction of Georgia law is not appropriately reviewable by this Court, and since Petitioner cannot for the first time on appeal raise an issue that was not asserted before, or considered by, the courts below, the Petition for Writ of Certiorari should be denied.

ARGUMENT

I. THIS COURT SHOULD NOT GRANT CERTIORARI IN ORDER TO DECIDE THIS CASE ALONG WITH *McKESSON CORP. V. DIVISION OF ALCOHOLIC BEVERAGES AND TOBACCO*, ___ U.S. ___, 109 S. Ct. 3238 (1989), SINCE THIS CASE BEARS NO FACTUAL RESEMBLANCE AT ALL TO *McKESSON*.

Petitioner's attempt to liken the issues in this case with those before the Court in *McKesson* is nothing less than misleading. In framing its Question Presented, Petitioner has egregiously misrepresented the facts of this case by stating that the taxes at issue here were paid "under protest." In fact, the taxes complained of went unchallenged in any way until April of 1985, when Petitioner filed its claim for refund. *See* Order of Superior Court, ¶14, contained in Petitioner's Appendix as Exhibit C.

In essence, the *McKesson* petitioners argue that Florida erred in its legislative response to *Bacchus*, and that they are entitled to protection where they paid, under protest, taxes they believed to be unconstitutional. Alcoholic beverage manufacturers in Georgia also paid taxes under protest while attacking the constitutionality of Georgia's legislative response to *Bacchus*, but their challenge was unsuccessful. *See Heublein, Inc. v. State of Georgia*, 256 Ga. 578, 351 S.E.2d 190, *appeal dismissed*, 483 U.S. 1013 (1987). Petitioner here, however, unlike the taxpayers in *McKesson*, is seeking refunds based on a finding that Georgia's pre-*Bacchus* taxing structure was unconstitutional. As discussed above, the pre-*Bacchus* taxes at issue here were not paid under protest, and were collected in good faith for almost 50 years. Accordingly, this case is dissimilar in all pertinent respects to *McKesson*, and does not warrant further review.

II. THIS COURT SHOULD NOT GRANT CERTIORARI TO DETERMINE WHETHER "THE DENIAL OF A REFUND OF UNCONSTITUTIONALLY COLLECTED TAXES IN AND OF ITSELF AMOUNTS TO AN UNCONSTITUTIONAL DEPRIVATION OF PROPERTY," WHERE PETITIONER FAILED TO PROPERLY RAISE THIS ARGUMENT AT ANY POINT DURING THE PROCEEDINGS BELOW.

For the first time on appeal, and in an attempt to equate this case to *McKesson*, Petitioner urges that it has a "federal constitutional right to a refund of taxes assessed in violation of the Commerce Clause." Petition, p. 9. This assertion, however, flies in the face of Petitioner's own

Complaint, wherein the claim for relief was based not on a "federal constitutional right to a refund," but on Georgia's refund statute. Under the circumstances, Petitioner may not now be heard to make arguments heretofore unknown to the record, and unreviewed by the courts below. *See Beck v. Washington*, 369 U.S. 541, 550-54 (1962) (assuming a federal question has been properly framed, it is essential that it be raised, presented, and pursued in a timely and proper manner at the appropriate point or points in the state court proceedings). *See also Hill v. California*, 401 U.S. 797, 805 (1971), *citing Cardinal v. Louisiana*, 394 U.S. 437, 438 (1969) (a federal claim cannot be considered by the Court unless it has been either raised in the state court or considered and resolved by the state court).

III. THIS COURT SHOULD NOT GRANT CERTIORARI TO DETERMINE WHETHER THE SUPREME COURT OF GEORGIA, IN CONSTRUING GEORGIA'S TAX STATUTES SO AS TO PRECLUDE THE REFUND OF STATE TAXES SOUGHT BY PETITIONER, PROPERLY APPLIED GEORGIA LAW.

The Georgia Supreme Court held that state taxes are not "illegally assessed," within the meaning of Georgia's statute authorizing refunds of such payments, when collected under a statute later held unconstitutional in a judicial decision properly given prospective effect only. This decision, an interpretation of state law by the highest court in the state, is, in the absence of a properly presented claim or remedy based on federal law, not reviewable in this Court. *See, e.g., Kingsley Pictures Corp.*

v. Regents, 360 U.S. 684, 688 (1959); *Guaranty Trust Co. v. Blodgett*, 287 U.S. 509, 512-513 (1933).

In considering Petitioner's novel argument that the Georgia refund statute mandates a refund under the circumstances of this case, the Georgia Supreme Court pointed out that nothing in the statute required a "retroactive application of the constitutional decision." 259 Ga. 363, 364 n.2, 382 S.E.2d 95, 96 n.2 (1989). Instead, the court applied the balancing test which this Court set forth in *Chevron Oil v. Huson*, 404 U.S. 97 (1971) and which the Georgia Supreme Court adopted itself in *Flewellen v. Atlanta Casualty Co.*, 250 Ga. 709, 300 S.E.2d 673 (1983). Under the *Chevron* line of cases, a court deciding whether to apply its decision prospectively should:

> (1) Consider whether the decision to be applied nonretroactively established a new principle of law, either by overruling past precedent on which litigants relied, or by deciding an issue of first impression whose resolution was not clearly foreshadowed.
>
> (2) Balance the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retroactive operation would further retard its operation.
>
> (3) Weigh the inequity imposed by retroactive application, for, if a decision would produce substantial inequitable results if applied retroactively, there is ample basis for avoiding the injustice or hardship by a holding of nonretroactivity.

James Beam Distilling Co., 259 Ga. at 364, 382 S.E.2d at 96, *quoting Flewellen v. Atlanta Casualty Co.*, 250 Ga. at 712, 300 S.E.2d at 676.

The Georgia Supreme Court noted, with respect to the first prong of the *Chevron* test, that the tax structure attacked by Petitioner existed without challenge from 1939 – when the court expressly approved the constitutionality of the law – until 1985, when it was amended to comport with the principles set down in *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984). After so noting, the court expressly found that:

> During the time that the taxes at issue here were collected, the State had no reason to believe that the import taxes were unconstitutional. Moreover, when it became clear that there might be constitutional problems with the statute, see *Bacchus*, supra, the legislature moved promptly to amend the statute to rectify the defects. Thus, it appears that the first prong of the *Chevron* test favors prospective application of the rule.

259 Ga. at 365, 382 S.E.2d at 96.

The court concluded that the *Chevron* test's second prong had no application in this context since the statute at issue was repealed in 1985, prior to the filing of Petitioner's lawsuit. *Id.*

Finally, in applying the third prong, the court weighed the equities in awarding over 30 million dollars in refunds for amounts collected by the State in good faith under its unchallenged and presumptively valid tax statute, where the taxpayers themselves in all likelihood passed these costs on to their Georgia consumers.

> In such situations, this Court and the courts of other states have frequently declined retroactive application, even though the ruling allows an unconstitutional statute to remain in effect for a limited period of time. *See, Federated Mutual Ins.*

> *Co. v. Dekalb County*, 255 Ga. 522 (341 S.E.2d 3) (1986); *American Trucking Association v. Gray*, 295 Ark. 43 (746 S.W.2d 377) (1988) (out-of-state truckers were not entitled to refund of taxes found violative of the Commerce Clause); *National Distributing Co. v. Office of the Comptroller*, 523 So.2d 156 (Fla. 1988) (prospective ruling appropriate where equities weighed against refund of taxes paid under alcoholic beverage statute); *Metropolitan Life Ins. Co. v. Commissioner of Dept. of Insurance*, 373 N.W.2d 399 (N.D. 1985) (no refund of taxes paid under statute giving unconstitutional preference to domestic insurance companies).

259 Ga. at 365-66, 382 S.E.2d at 97.

Based on the balancing test discussed above, and after again noting the State's reliance on a decision of the Georgia Supreme Court approving the tax structure in question over 50 years before, the court determined that prospective application of the trial court's decision was appropriate, and rejected as unpersuasive Petitioner's reading of O.C.G.A. § 48-2-35(a). Further review of this decision construing state law would be inappropriate.

CONCLUSION

The issue presented by this case involves only the interpretation of state laws. Accordingly, and based on the arguments presented herein, it is respectfully requested that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

JEFF L. MILSTEEN
Assistant Attorney General
(Counsel of Record)

MICHAEL J. BOWERS
Attorney General

H. PERRY MICHAEL
Executive Asst. Attorney General

HARRISON KOHLER
Deputy Attorney General

DAVID A. RUNNION
Senior Asst. Attorney General

WARREN R. CALVERT
Assistant Attorney General

Attorneys for Respondents

132 State Judicial Building
40 Capitol Square, S. W.
Atlanta, Georgia 30334
(404) 656-3388